

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL SHAWN JARVIS,

Defendant-Appellant.

UNPUBLISHED

February 17, 2011

No. 295444

Emmet Circuit Court

LC No. 09-003137-FC

Before: MURPHY, C.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of second-degree criminal sexual conduct, MCL 750.520(c)(1)(a) (victim under age 13), and was sentenced to concurrent terms of 96 to 180 months' imprisonment on each conviction. Defendant appeals as of right. We affirm.

At trial, the complainant testified that defendant, her mother's fiancée, had sexually abused her on numerous occasions from the time she was eight-years-old until she reported the abuse two years later. The complainant first relayed these allegations to a protective services worker who was following up on an unrelated complaint. Thereafter, a criminal investigation was opened and defendant voluntarily submitted to an interview. The Michigan State Police trooper and the protective services worker who interviewed defendant both testified that he initially denied any wrongdoing, but eventually admitted he had fondled and digitally penetrated the complainant's vagina on numerous occasions. Defendant testified on his own behalf and denied the allegations and further denied confessing at the time of his interview.

Defendant first argues that his constitutional right to present a defense was violated when the trial court denied his motion to appoint an expert witness to testify regarding the reliability and credibility of his statements to police in light of his "psychological makeup." We disagree.

We review a trial court's decision on whether to appoint an expert for an indigent defendant for an abuse of discretion. *People v Lueth*, 253 Mich App 670, 689; 660 NW2d 322 (2002). An abuse of discretion occurs when the trial court's decision is not within the range of "reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

A criminal defendant may request appointment of an expert if he can demonstrate there is a nexus between the facts of the case and the need for an expert. MCL 775.15; *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006). However, “[i]t is not enough for the defendant to show a mere possibility of assistance from the requested expert.” *People v Tanner*, 469 Mich 437, 443; 671 NW2d 728 (2003). Thus, if a defendant fails to show that the proposed expert testimony would likely aid in his defense, a trial court does not abuse its discretion by denying a motion for appointment of an expert witness. *Id.*

In the case at bar, defendant has failed to establish that the requested expert’s testimony would have been beneficial at trial. In fact, trial counsel admitted at the motion hearing that it was unknown whether the requested expert’s testimony would be helpful. Again, the “mere possibility of assistance from the requested expert” is not enough. *Tanner*, 469 Mich at 443.

We also find that the proposed expert’s testimony would not have been helpful in light of defendant’s denial that he ever admitted engaging in inappropriate sexual conduct with the complainant. Thus, expert testimony that defendant may have falsely confessed due to his diminished mental capacity would have undermined defendant’s credibility because it contradicted defendant’s own testimony, rather than bolstered his defense at trial. As such, the trial court did not abuse its discretion in denying defendant’s motion because he failed to show that the expert testimony would likely benefit his defense. *Carnicom*, 272 Mich App at 618-619.

Defendant also argues he is entitled to resentencing because his sentence constitutes an improper upward departure. We disagree.

Michigan’s sentencing guidelines generally require a sentencing court to impose a minimum sentence within the appropriate sentence range determined by the points assigned to the defendant. MCL 769.34(2); *People v McCuller*, 479 Mich 672, 684-685; 739 NW2d 563 (2007). However, the sentencing guidelines scheme allows for departure from the recommended range, so long as the lower court can provide substantial and compelling reasons for the departure on the record. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). The substantial and compelling reasons that a lower court relies on to support a departure must be based on objective and verifiable factors that are capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Even when a lower court provides substantial and compelling reasons to support a departure from the sentencing guidelines, the rule of proportionality must still be satisfied. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). Finally, the lower court may not rely on factors that have already been accounted for in the sentencing guidelines to support a departure from the recommended minimum range unless the court finds that the factors have been given inadequate or disproportionate weight in the guidelines. MCL 769.34(3)(b); *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998).

In reviewing a lower court’s departure from the sentencing guidelines, we must apply three standards: clear error as to the lower court’s determination that a sentencing factor exists; de novo as to whether a factor is objective and verifiable; and abuse of discretion as to whether the lower court’s finding that an objective and verifiable factor amounts to a substantial and compelling basis for departure. *Babcock*, 469 Mich at 264-265.

In the instant case, defendant's recommended minimum guidelines range was 36 to 71 months. However, the trial court imposed a minimum sentence of eight years' imprisonment, which constituted an upward departure of 25 months. The trial court articulated two reasons for departure. First, the trial court concluded the offense variables were given inadequate weight by the sentencing guidelines. Second, the trial court determined the fact that the abuse occurred in the complainant's own home, a place that should serve as a safe haven, justified departure. Each will be addressed in turn.

The trial court specifically referenced OV 10 (exploitation of a vulnerable victim) in its determination that the guidelines had been given inadequate weight. Defendant was assessed 10 points for OV 10, which is appropriate when "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). Here, the trial court highlighted the fact that three aspects of vulnerability were present in the instant case; namely youth, domestic relationship, and authority status. Despite the assessment of points under OV 10, we are satisfied the guidelines did not adequately reflect the complainant's vulnerability, given her young age, coupled with defendant's status as complainant's mother's fiancée and his position in the household as the disciplinarian, when any one of these factors would serve as the basis for the assessment of points.

The trial court also referenced OV 13 (continuing pattern of criminal activity) in its determination that the guidelines had been given inadequate weight. Defendant was assessed 25 points for OV 13, which is appropriate when the sentencing offense "was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person." MCL 777.43(1)(c). This is the highest assessment possible when the sentencing offense is not first-degree criminal sexual conduct. MCL 777.43(2)(d). The trial court found by a preponderance of the evidence that defendant had committed at least eight penetrations of the complainant over the course of the abuse, more than double the number of crimes that would warrant the assessment of 25 points. The facts underlying acquitted conduct may be considered by the sentencing court in deciding whether to depart from the guidelines. *People v Parr*, 197 Mich App 41, 46; 494 NW2d 768 (1992). Thus, the stated reason for the upward departure did not constitute an abuse of discretion.

We also reject defendant's argument that the additional basis for departure, namely the location of the abuse, constituted a reiteration of the initially identified basis for departure. The trial court's determination that the location of the abuse qualified as a basis for departure was based on premise that a home should be a safe place. The location of the criminal conduct is not a factor specifically considered under OV 10. We likewise reject defendant's argument that the location of the abuse had already been taken into account under OV 10 under the phrase "domestic relationship." OV 10 takes into account a situation where the offender *exploits* the domestic relationship. MCL 777.40(1)(b). "Exploit" is defined in terms of manipulation of the *victim*. MCL 777.40(3)(b). The fact that the abuse occurred in the home is not itself a reflection of defendant's manipulation of the complainant through their domestic relationship. Moreover, unlike in *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003), where this Court held that the location of a sexual assault may constitute evidence of pre-offense predatory conduct pursuant to MCL 777.40(3)(a) so as to justify the scoring of fifteen points for this guideline, the trial court did not find this to be the case here. Rather, the trial court found that the

location was important in its impact to the long-term, harmful effects defendant's assault would have on the victim. As such, the sentencing court did not "base a departure on an offense characteristic . . . already taken into account[.]" MCL 769.34(b).

Finally, defendant argues that he is entitled to resentencing because the sentencing court failed to explain why the sentence imposed was more proportionate than a sentence within the guidelines recommendation. We disagree.

Defendant's reliance on *People v Smith*, 482 Mich 292; 754 NW2d 282 (2008) is misplaced. In *Smith*, the defendant's minimum sentence was twice the highest recommended minimum under the guidelines. *Id.* at 298. The *Smith* Court vacated the defendant's sentences because the trial court had articulated substantial and compelling reasons to justify a departure, yet had failed to adequately explain the extent of the departure. *Id.* at 310-311.

The departure in the instant case is not the same as the departure in *Smith*, where the "connection between the reasons given for departure and the extent of the departure" was unclear. *Smith*, 482 Mich at 312. Although the trial court did not specifically state why a minimum sentence that exceeded the upper range of the sentencing guidelines by 25 months was more proportionate than a minimum sentence within the guidelines, the record clearly establishes that the 96-month minimum sentences are proportionate in light of the articulated appropriate reasons for departure. In sum, we conclude that defendant has not established a sufficient basis for disturbing the trial court's determination that substantial and compelling reasons existed to depart for the guidelines' recommended range for the minimum sentence. Moreover, the degree of the departure was not an abuse of discretion.

Affirmed.

/s/ William B. Murphy
/s/ Christopher M. Murray
/s/ Douglas B. Shapiro